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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 737

TAZE HAMRICK GIBSON, PETITIONER

v.

A. P. REYNOLDS, E. H. MELLOR, B. R. MCCLANAHAN, S. C. VINSONHALER, JOE K. MAHONY, EBENEZER L. COMPERE AND TROY W. LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas (R. 16-41) is reported at 77 F. Supp. 629. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 48-58) is reported at 172 F. 2d 95.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 11, 1949 (R. 58). The time for filing the petition for a writ of certiorari was extended by order of Mr. Justice Reed to April 25, 1949 (R. 63),

and the petition was filed on April 18, 1949. The jurisdiction of this Court is invoked under 28 U S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether respondents, irrespective of motives, may be required to respond in damages because of official acts, involving the exercise of judgment and discretion, necessarily performed by them in carrying out the purposes of the Selective Training and Service Act.

2. Whether the complaint filed by petitioner in the case at bar sets forth facts sufficient to allege a cause of action either for malicious prosecution or for violation of the Civil Rights statutes of the United States.

3. Whether this suit is barred by the applicable Arkansas statute of limitations with respect to the alleged violation of the Civil Rights Statutes.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and the regulations issued thereunder are set forth in the Appendix, *infra,* pp. 15-19.

STATEMENT

On January 29, 1948, petitioner filed a complaint in the United States District Court for the Western District of Arkansas against respondents, claiming damages in the amount of $10,000 on the ground that their refusal to exempt him from training and service as a minister of religion under Section 5(d) of the Selective Training and Service Act, 54 Stat. 888, 50 U. S. C. App. 305(d), *infra* p.

15, had caused him to be arrested, maliciously prosecuted, and convicted without probable cause, and to be illegally imprisoned pending the time his conviction was reversed by this Court.[1] The complaint further stated that the action of the respondents in denying him classification as a minister of religion was contrary to the Fifth Amendment and in violation of the Civil Rights Statute. (R. 3-13.)

The material allegations in the complaint are briefly as follows: On June 30, 1942, petitioner registered under the Selective Training and Service Act with Local Board "A", El Dorado, Arkansas (R. 4). On October 12, 1942, he filed a Selective Service questionnaire asserting that he was a minister of religion of Jehovah's Witnesses and claiming that he was entitled to be placed in Class IV-D and to be exempted from training and service under Section 5(d) of the Selective Training and Service Act (R. 4-5). On November 6, 1942, Local Draft Board "A", El Dorado, Arkansas, classified peti-

[1] The complaint states that petitioner is a citizen of the State of Indiana, and further shows that at the times mentioned therein, respondents Reynolds, Mellor, and McClanahan were chairman and members, respectively, of Selective Service Local Draft Board "A", El Dorado, Arkansas, that respondents Vinsonhaler and Mahony were chairman and member of Selective Appeal Board No. 2, Little Rock and El Dorado, Arkansas, respectively, that respondent Compere was Selective Service State Director, El Dorado, Arkansas, and that respondent Lewis was chief of the legal division and assistant to the Selective Service State Director, Little Rock, Arkansas. (R. 4).

tioner as I-A, *i.e.*, liable for training and service in the armed forces (R. 5). On May 8, 1943, Appeal Board No. 2 reversed the classification made by Local Board "A" and placed petitioner in Class IV-E, which made him liable for service in a civilian public service camp as a conscientious objector, thereby denying him exemption from training and service as a minister of religion (R. 5).

Thereafter, petitioner requested respondent Compere, State Director of Selective Service for Arkansas, to appeal the determination to the President of the United States, and to stay the induction process, but respondents Compere and Lewis refused to take such action, and on May 23, 1944, petitioner was assigned to work in a civilian public service camp (R. 5-6). On August 21, 1944, pursuant to order, plaintiff appeared at the local board in Carlinville, Illinois, and was sent to the public service camp at Hill City, South Dakota, where he remained until August 28, 1944, when he was found to be physically acceptable (R. 6). He did not report to do work of national importance, as indicated in the order mailed him, but appeared merely to complete the administrative process (R. 6). At his request, the Director of the camp gave him a statement showing that he had reported there on August 23, 1944, that the administrative process had been completed, and that without performing any work the plaintiff had voluntarily left the camp. (R. 6, 7).

On or about December 2, 1944, plaintiff was arrested on a charge of violating Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311), under an indictment returned in the United States District Court for the District of South Dakota. The indictment charged that plaintiff, on August 23, 1944, reported at the camp in South Dakota, was enrolled there for work of national importance, but left on August 28, 1944, with the intention of staying away. (R. 7.)

On or about February 13, 1945, following trial, he was convicted and sentenced to five years imprisonment and committed to the custody of the Attorney General. On appeal the conviction was affirmed. *Gibson* v. *United States,* 149 F. 2d 751 (C. A. 8). On December 23, 1946, this Court on writ of certiorari reversed the conviction and remanded the case for a new trial on the ground that petitioner should have been permitted to interpose in the criminal proceeding the defense that the Selective Service classification assigned to him was erroneous. *Gibson* v. *United States,* 329 U. S. 338. (R. 7, 8.) On February 4, 1947, the indictment was dismissed, and plaintiff was discharged (R. 8).

The respondents moved separately to dismiss the action on the grounds (1) that the complaint failed to state a claim against them on which relief could be granted, and (2) that if the claim should be otherwise stated, the complaint showed on its face that the alleged claim was barred by the statute of

limitations (R. 13-14). The district court held that respondents were within the rule of immunity which exempts public officers from civil liability for acts performed by them within the scope of their authority (R. 16-41), and dismissed the complaint (R. 41-42). On appeal, the court below affirmed the decision of the district court, holding that respondents were immune from this suit because the complaint failed to state facts from which it could be inferred that the acts of respondents "were not committed in the discharge of their official duties or were not within the scope of their authority," or that they were committed for the purpose of maliciously injuring petitioner (R. 48-58).

ARGUMENT

1. The conclusion reached by both the district court and the court below that the complaint failed to state a cause of action against respondents is clearly correct.[2] The rule that administrative and quasi-judicial officers are immune from civil liability for acts, involving the exercise of judgment and discretion, performed by them while proceeding within the scope of their authority has long been recognized and has been applied to many dif-

[2] The United States District Court for the Northern District of Ohio, and the United States Court of Appeals for the Fifth Circuit followed the decision of the court below in the case of *Dodez* v. *Weygandt*, et al., No. 10775, decided May 2, 1949, which was a similar proceeding. *Dodez* v. *United States*, No. 86, O.T. 1948, was a companion case to *Gibson* v. *United States*, 329 U.S. 338.

ferent federal officers. *Spalding* v. *Vilas,* 161 U. S. 483; *Mellon* v. *Brewer,* 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530; *Brown* v. *Rudolph,* 25 F. 2d 540 (C. A. D. C.), certiorari denied, 277 U. S. 605; *Standard Nut Margarine Company* v. *Mellon,* 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Cooper* v. *O'Connor,* 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Lang* v. *Wood,* 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Adams* v. *Home Owners' Loan Corp.,* 107 F. 2d 139 (C. A. 8); *Phelps* v. *Dawson,* 97 F. 2d 339 (C. A. 8).[3]

The basis for the immunity rule is said to be that the public interests require that officers, when acting within the scope of their authority, should be under no apprehension that the motives that control their official conduct may at any time subject them to a civil action for damages. (*Spalding* v. *Vilas, supra,* at p. 498); otherwise that perfect freedom which ought to exist in discharge of public duty might be seriously restrained. *Cooper* v.

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[3] These cases include the Postmaster General, the Secretary and Assistant Secretary of the Treasury, members of the Securities and Exchange Commission, the Comptroller of the Currency, members of the Parole Board, the warden of a penitentiary, the Director of Prisons, officials of the Home Owners Loan Corporation, the Commissioners of the District of Columbia, a building inspector, the Commissioner of Indian Affairs, the Chief of Record of Pension, War Department, and a deputy fire marshal, and numerous others.

O'Connor, supra, at p. 142. The considerations of public policy stated by the courts to underlie the immunity rule are conspicuous in offices such as those held by respondents. As the court below observed, members of the local Draft Boards, the Boards of Appeal, and the State Directors and their legal advisors must fairly, fearlessly, freely, and conscientiously determine the destinies of a huge sector of the American people, and there could hardly be any group of public officers whose independence of action is more essential, and whose freedom from threats, duress, and compulsion of any kind is more necessary (R. 53).

Respondents were clearly acting within the scope of their authority when they performed the acts involved here. Petitioner was required by law to register and have his status decided by the Selective Service officers. *United States ex rel. Goodman* v. *Hearn,* 153 F. 2d 186, 187 (C. A. 5); *Harris* v. *Ross,* 146 F. 2d 355, 357 (C. A. 5). The fact that he claimed exemption as a minister of religion did not excuse him from the duty of registering. Respondents Reynolds, Mellor and McClanahan of the Local Board were required to assign a classification to all registrants, including petitioner. In assigning a classification to petitioner, they were required to pass upon the question of petitioner's claimed exemption and in so doing they acted within the scope of their authority under Section 10(a)(2), of the Selective Training and Service Act, *infra,* pp. 15-16, 32 C. F. R. 601.128 and

603.326 (1940 Supp.), *infra,* pp. 17-18. Respondents Vinsonhaler and Mahony of the Board of Appeals, in passing upon petitioner's appeal from the Local Board's classification, likewise acted within the scope of their authority under Section 10(a)(2) of the Selective Training and Service Act, *infra,* pp. 15-16. The respondent, State Director of Selective Service, Compere, and his assistant (respondent Lewis), in passing upon petitioner's request that he be permitted to appeal his classification to the President, acted within the scope of their authority under Section 10(b) of the Selective Training and Service Act, *infra,* pp. 15-16, 32 C. F. R. 603.379, 603.380 (1940 Supp.), *infra,* pp. 18-19. Thus, all of the respondents were required by law to act upon the matters submitted to them by petitioner and any alleged error that was made in performing those duties did not place their acts beyond the scope of their authority for the purposes of immunity. *Bradley* v. *Fisher,* 13 Wall. 335, 351-354.

Wise v. *Withers,* 3 Cranch 330, relied on by petitioner (Pet. 9), is not in point. The militia officer there involved had no duty to make quasi-judicial determinations but rather was held to be a trespasser when he undertook to execute a void order. The other federal cases upon which petitioner relies (Pet. 10-11), are likewise not in point.

Petitioner's general and conclusory allegations that respondents acted arbitrarily, capriciously and maliciously in the absence of adequate allega-

tions of fact to support them are of no avail. Furthermore, respondents acted within the scope of their authority and they are immune from liability for their acts regardless of what their motives may have been. *Yaselli* v. *Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503; *Standard Nut Margarine Co.* v. *Mellon*, 72 F. 2d 557, 559 (C. A. D. C.); *Cooper* v. *O'Connor, supra; Adams* v. *Home Owners' Loan Corporation et al., supra; Bradley* v. *Fisher*, 13 Wall. 335, 348.

We submit that the acts of respondents involved matters of judgment and discretion within the scope of their authority, and that they are immune from civil liability for the acts complained of by petitioner.

2. Petitioner contends that the action of respondents in refusing to exempt him as a minister of religion was malicious and that such action by them in Arkansas caused him to be maliciously prosecuted. Petitioner deliberately deserted the civilian public service camp in South Dakota and thus subjected himself to a charge of violating Section 11 of the Act. He was, therefore, prosecuted in South Dakota. Cf. *United States* v. *Anderson*, 328 U. S. 699. Consequently, petitioner's claim for malicious prosecution must be determined under the law of South Dakota. Leflar on *Arkansas Conflict of Laws*, Sec. 78, p. 187. Cf. *Missouri Pacific R.R. Co.* v. *Diffee*, 212 Ark. 55.

The Supreme Court of South Dakota has defined the necessary elements of "malicious prosecution"

in *Stauffacher* v. *Brother,* 67 So. Dak. 314, 317, 318, 292 N. W. 432 (1940), as follows:

> The elements of malicious prosecution are:
>
> "(1) the commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage conforming to legal standards resulting to plaintiff." *Just* v. *Martin Bros. Co.,* 37 S. D. 470, 476, 159 N. W. 44, 46; *Larsen* v. *Johnson,* 47 S. D. 202, 204, 197 N. W. 230; 38 C.J. 386; *Chapman* v. *Anderson,* 55 App. D. C. 165, 3 F (2d) 336; *Wheeler* v. *Nesbitt et al.,* 24 How. 544, 65 U. S. 544, 16 L. Ed. 765; *Brown* v. *Keyes,* 54 S. D. 596, 223 N. W. 819.[4]

Here, petitioner has failed to allege the essential elements of "malicious prosecution," as above set forth. He has failed to allege that these respondents had anything to do with the "causation" of or

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[4] While the foregoing case does not define "legal causation" it cites with approval *Chapman* v. *Anderson,* 55 App. D. C. 165, 3 F. 2d 336, 339 (1925) wherein the court states:

> To support an action for a malicious criminal prosecution, the plaintiff must prove the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement * * *. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice, * * *.

that they instigated the criminal prosecution of which he complains, or, in fact, that said respondents even knew of the institution of such prosecution. He has also failed to allege, except by conclusion of law, that there was no probable cause for his prosecution. On the contrary, in par. VI of the complaint (R. 7) petitioner stated that he voluntarily left the civilian public service camp into which he had been inducted, which in itself was all the probable cause needed, if indeed it was not a deliberate invitation, for his indictment, arrest and trial (R. 6-7). Furthermore, petitioner has failed to show any malice on the part of the respondents in the South Dakota prosecution. Therefore, petitioner has not shown the necessary elements to justify recovery for malicious prosecution even if respondents were not immune from civil liability.

3. In his complaint, petitioner, as stated by the district court (R. 39), apparently attempted to state a claim under the Civil Rights Statutes by combining R. S. 1979 and 1980, 8 U. S. C. 43, 47.[5] The conduct of respondents here in no way involves action "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" as contemplated by R. S. 1979, *infra*, p. 16; nor does it involve any individual or State action for which R. S. 1980, *infra*, p. 16, was intended to

[5] Petitioner sets forth these sections in the petition (Pet. 2-3), but does not discuss or elaborate the point.

provide redress. *Love* v. *Chandler, et al.*, 124 F. 2d 785, 786 (C. A. 8).[6]

In any event, it is plain that petitioner's alleged claim under those sections is barred by limitations. The last event that took place as a direct result of the alleged acts was petitioner's entry into the civilian public service camp at Hill City, South Dakota, on August 23, 1944, and his remaining there until August 28, 1944, when he deliberately left (R. 7). The acts of respondents, of which petitioner herein complains, happened prior to, and all possible direct results therefrom terminated on, August 28, 1944, *more than three years* before the commencement of this action on January 29, 1948 (R. 3). Whatever happened to petitioner thereafter was the result of his own deliberate determination to desert the camp and suffer whatever might be the consequences, which action was voluntary and deliberate on his part and with which the respondents had nothing whatever to do. Therefore, he is barred by the Arkansas Statute of Limitations (See *O'Sullivan* v. *Felix*, 233 U. S. 318, 322), whether the claim be considered as one in the nature of direct trespass [one-year limitation; II Pope's Digest of Statutes of Arkansas (1937), Section 8929; 37 Arkansas Statutes 1947, Section

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[6] Cf. also *Mitchell* v. *Greenough, et al.*, 100 F. 2d 184 (C. A. 9), certiorari denied, 306 U.S. 659; *Laughlin* v. *Rosenman*, 163 F. 2d 838 (C. A. D. C.); *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240 (C. A. 3), relied upon by petitioner involved action by state officials acting purportedly under state statutes.

201] or one in the nature of trespass on the case [three-year limitation, II Pope's Digest of Statutes of Arkansas (1937), Section 8928; 37 Arkansas Statutes 1947 206].

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decision, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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May 1949.

APPENDIX

1. The pertinent parts of the Selective Training and Service Act, 54 Stat. 885, 888, 893, as amended by the Act of December 5, 1943, 57 Stat. 596, 50 U. S. C. App. 305(d), 310(a), (b) read as follows:

> Sec. 5(d). Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
>
> Sec. 10(a)(2). * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. * * * Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (l) of this Act.
>
> Sec. 10(b). The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President and any other authority vested in him under this Act, to such officers,

agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

2. The pertinent provisions of the Revised Statutes of the United States, 8 U. S. C. 43, 47, read as follows:

Sec. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Sec. 1980. * * *

* * * * *

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as

a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

3. The pertinent parts of the Selective Service Regulations, 32 C. F. R. (1940 Supp.) read as follows:

§ 601.128. *Jurisdiction.* The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed, and to all persons whose registration cards are duly transferred to it. It shall have full authority to do and perform all acts authorized by the selective service law. * * *

§ 601.140. *Jurisdiction.* Each board of appeal shall have jurisdiction to review any decision concerning the classification of a registrant by any local board in the area of the board of appeal, and to affirm, modify, or reverse the decision, provided that an appeal has been filed with the local board. * * *

§ 603.326. *Responsibility of local board.* (a) * * * It is the local board's responsibility to decide in the first instance in which class each registrant should be placed. This should be accomplished so as to give equal and fair justice to all. The entire administration of the selective service law shall be impartial and

free from any political influences. There shall be no discrimination for or against any person because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization.

(b) Classification is the key to selection, and it must be accomplished in the spirit of the Selective Service Act, in the preamble of which Congress has declared "That in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system. * * * "

§ 603.379. *Conditions for appeal to the President.* An appeal from a determination of a board of appeal may be made to the President, only if all the following conditions are satisfied:

(a) A board of appeal must have placed the registrant in Class I or Class IV-E, and at least one or more members of the board of appeal must have dissented from a determination of that board that the registrant should not be deferred because of dependency.

(b) The appeal to the President must be on grounds of dependency only.

(c) The appeal (on the last page of the questionnaire) must be signed by the registrant, a dependent of the registrant, or the government appeal agent.

(d) The appeal must be made within 5 days of the mailing of the notice of classification or notice of continuance of classifications (§ 603.377), unless the local board grants an extension of time.

(e) A member of the local board, the government appeal agent, or the Governor must explain and certify, in writing, that great and unusual hardship will follow the induction of

the registrant, and the person so certifying must specifically recommend deferment.

§ 603.380. *Procedure of local board when appeal to the President is made.* When an appeal to the President is made, the local board shall:

(a) Enter on the Classification Record the date the appeal is forwarded.

(b) Forward to the Director of Selective Service for transmittal to the President all papers, including a summary of any oral testimony pertaining to the registrant except the registration card and the duplicate report of physical examination (Form 200).

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